

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs August 26, 2009

JAY H. CHAMBERS v. STATE OF TENNESSEE

Appeal from the Criminal Court for Scott County
No. 7547 E. Shayne Sexton, Judge

No. E2008-02149-CCA-R3-PC - Filed February 9, 2010

The Petitioner, Jay H. Chambers, appeals the Scott County Criminal Court's denial of his petition for post-conviction relief from his conviction for rape and resulting ten-year sentence. The Petitioner contends that the trial court erred in finding that he received the effective assistance of counsel. We reverse the judgment of the trial court and grant the Petitioner a delayed appeal to file an application for permission to appeal with the Tennessee Supreme Court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Reversed,
Delayed Appeal Granted**

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which D. KELLY THOMAS, JR., and CAMILLE R. MCMULLEN, JJ., joined.

Michael Robert Giaimo, Cookeville, Tennessee, for the appellant, Jay H. Chambers.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; William Paul Phillips, District Attorney General; John W. Galloway, Jr., Deputy District Attorney General; and Thomas E. Barclay, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The Petitioner was convicted of rape on November 17, 1999, for his December 1998 assault of the minor victim. After sentencing, he filed a notice of appeal. No motion for new trial was filed. He later voluntarily dismissed his appeal, and five months later he filed a pro se motion for new trial. Sixteen months later, he filed a second motion for new trial, this time through counsel, and filed an amendment the following day. A hearing was held on the

motion, and the Petitioner filed a notice of appeal. Approximately four months after the notice of appeal was filed, the trial court entered its order denying the motion for new trial. On direct appeal, this court held that the motion for new trial was not timely filed and that the interest of justice did not require waiving the timely filing of a notice of appeal because the Petitioner was not entitled to relief on the merits of his issues. The Petitioner's issues on direct appeal included an allegation of ineffective assistance of trial counsel. State v. Jay Chambers, No. E2002-01308-CCA-R3-CD, Scott County (Tenn. Crim. App. Mar. 25, 2004).

On May 28, 2004, the Petitioner then filed a pro se petition for post-conviction relief in which he raised numerous grounds for relief, including the ineffective assistance of counsel on direct appeal. The trial court entered an order dismissing the petition without appointing counsel or conducting a hearing. The Petitioner appealed, and this court held that all of the Petitioner's claims except for that of ineffective assistance of counsel on direct appeal had been either waived because they could have been raised on direct appeal, or in the case of ineffective assistance of trial counsel, previously determined on direct appeal. This court held that the Petitioner's issue regarding the effectiveness of appellate counsel was not waived or previously determined and that the record did not reflect whether the trial court considered the claim. The court remanded the case for the trial court to determine whether appellate counsel was ineffective in not filing an application for permission to appeal from this court's opinion on direct appeal or in failing to advise the Petitioner of his right to file such an application pro se. The court ordered that the Petitioner would be allowed to file an amended petition addressing this issue alone. Jay Homer Chambers v. State, No. E2004-01862-CCA-R3-PC, Scott County (Tenn. Crim. App. Sept. 26, 2005).

Despite this court's limitation on the scope of an amended petition, the Petitioner filed an amendment to his petition in which he raised the following allegations of ineffective appellate counsel:

- (1) Counsel failed to raise a sufficiency of the evidence claim in the motion for new trial, precluding consideration of it on appeal;
- (2) Counsel failed to request a transcript of the jury instructions in order to preserve appellate review of any claims;
- (3) Counsel failed to raise any issue in the motion for new trial and on direct appeal relative to trial counsel's failure to challenge the medical evidence provided by Dr. Wolfer "with medical evidence that can be obtained in any well known medical book";

- (4) Counsel failed to challenge trial counsel's failure to object to and challenge Dr. Wolfer's qualifications as an expert;
- (5) Counsel failed to preserve issues regarding defective jury instructions, including the charge on lesser included offenses and intoxication; and
- (6) Counsel failed to raise any issue with respect to trial counsel's failure to object to prosecutorial misconduct and the trial court's lack of action thereon.

Despite being over forty typewritten pages long, the Amended Petition did not make any factual allegations about the failure of appellate counsel to file an application for permission to appeal or to advise the Petitioner of his right to do so pro se. The trial court appointed counsel and conducted a hearing.

The Petitioner testified at the hearing that his understanding had been that trial counsel was to represent him on appeal. He said he believed trial counsel filed a motion for new trial but later learned counsel "filed a motion to drop everything" even though he did not instruct counsel to file a voluntary dismissal. He said that after trial counsel filed the motion to dismiss the appeal, he filed a pro se motion for new trial, and the trial court appointed a new attorney. He said he advised this attorney of the issues he wanted raised on appeal. He said he later filed a pro se post-conviction petition in which he raised the issues that had not been raised on direct appeal. He said he was not able to read and had to have the assistance of other inmates. He said he thought he had been prejudiced by the failure of trial counsel to file a timely motion for new trial.

On cross-examination, the Petitioner acknowledged that he had a hearing on his motion for new trial and that his original trial counsel testified at that hearing. He said that after relief was denied in his direct appeal, his appellate counsel did not ask the supreme court to hear the case and did not advise him that he could do that himself.

The State did not offer any evidence at the post-conviction hearing. The trial court found at the conclusion of the hearing that even if it assumed that appellate counsel's performance was deficient, the Petitioner had failed to demonstrate that he was prejudiced by counsel's deficient performance. The written order stated the additional finding that "the [P]etitioner suffered no prejudice as the likelihood of any relief sought by the [P]etitioner was nonexistent."

The Petitioner filed a notice of appeal. The notice was filed September 12, 2008, appealing from the trial court's July 21, 2008, order denying relief.

Initially, the State asserts that the filing of this appeal was untimely under Tennessee Rule of Appellate Procedure 4(a) and that the Petitioner has provided no reason why the interest of justice requires waiving of the filing of a notice of appeal. See T.R.A.P. 4(a). The Petitioner chose not to respond to the State's argument. Given the torturous path this case has traveled, we conclude that the interest of justice is best served by waiving the filing of the notice of appeal in order to bring finality to this case. We caution counsel, however, that this court expects timely compliance with the Rules of Appellate Procedure with respect to the filing of notices of appeal.

Thus, we consider the issue raised by the Petitioner as to whether the trial court erred in denying post-conviction relief based upon the ineffective assistance of appellate counsel. The burden in a post-conviction proceeding is on the petitioner to prove his grounds for relief by clear and convincing evidence. T.C.A. § 40-30-110(f) (2006). On appeal, we are bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456-57 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the trial court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457. Post-conviction relief may only be given if a conviction or sentence is void or voidable because of a violation of a constitutional right. T.C.A. § 40-30-103 (2006).

Due process of law requires that a criminal defendant be entitled to the effective assistance of counsel on appeal. Campbell v. State, 904 S.W.2d 594, 596 (Tenn. 1995); Evitts v. Lucey, 469 U.S. 387 (1985). The test by which we consider the effectiveness of appellate counsel is the same as that for trial counsel. Under the Sixth Amendment, when a claim of ineffective assistance of trial counsel is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial in terms of rendering a reasonable probability that the result of the trial was unreliable or the proceedings fundamentally unfair. Strickland v. Washington, 466 U.S. 668, 687 (1984); State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989). Also, in reviewing counsel's conduct, a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689; see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). Thus, the fact that a particular strategy or tactic failed or even hurt the defense does not, alone, support a claim of ineffective assistance. Deference is made to trial strategy or tactical choices if they are informed ones based upon adequate preparation. See Hellard, 629 S.W.2d at 9.

The Petitioner argues that there is no factual question that trial counsel failed to file a motion for new trial, which he claims prejudiced him on direct appeal because it deprived the Court of Criminal Appeals of jurisdiction to hear his appeal on its merits. He acknowledges that appellate counsel raised issues on direct appeal that should have been raised in the motion for new trial. He argues that this court's determination that the substantive issues lacked merit was not a true adjudication on the merits of those issues. The State argues that the trial court correctly denied relief because the Petitioner failed to show that appellate counsel's alleged errors affected the outcome of the direct appeal.

In this court's opinion on direct appeal, the Petitioner's claim of appellate counsel's deficiency was recited as "counsel did not 'prepare an application for permission to appeal to the Tennessee Court of Appeals [or] properly advise Petitioner of his right to file a pro se application for permission to appeal. As a result, Petitioner's time for filing such an application has now expired as a result of counsel's ineffectiveness.'" Jay Homer Chambers, slip op. at 3. This court remanded the case "on the sole issue of whether appellate counsel was ineffective in not filing an application for permission to appeal the opinion of this court or advising the [P]etitioner, according to his claims, of his right to file such an application himself." Id., slip op. at 4. Despite this limitation of the issue, the Petitioner has persisted in the trial court and on appeal in his attempt to broaden the scope of the issue beyond the specified actions or inactions of appellate counsel following the filing of this court's opinion on direct appeal. To the extent the Petitioner seeks to focus on other allegations of shortcomings by his trial and appellate counsel, they are beyond the scope of this proceeding. See id.

Returning to the claim of appellate counsel's performance following the Court of Criminal Appeals' decision on direct appeal, we conclude that the trial court erred in finding that the Petitioner was not entitled to relief because he failed to establish that he would have been granted relief had counsel filed the application for permission to appeal. See Wallace v. State, 121 S.W.3d 652, 658 (Tenn. 2003) (post-conviction petitioner alleging ineffective assistance of counsel for failure to file timely motion for new trial or motion to withdraw as counsel was not required to demonstrate actual prejudice in order to obtain a delayed appeal; counsel's performance was presumed prejudicial because counsel failed to subject the State's case to adversarial scrutiny). The Petitioner was unilaterally deprived of his right to seek second-tier review pursuant to Rule 11 of the Tennessee Rules of Appellate Procedure. The Petitioner testified that counsel did not file an application for permission to appeal, nor did counsel advise the Petitioner of his right to do so pro se. Appellate counsel did not testify at the hearing, nor did the State offer any proof that appellate counsel followed the procedures for withdrawing as counsel after an unsuccessful first-tier appeal that are prescribed by Tennessee Supreme Court Rule 14. The Petitioner is entitled to a delayed

appeal in order to pursue an application for permission to appeal to the Tennessee Supreme Court. State v. Evans, 108 S.W.3d 231 (Tenn. 2003); see Tenn. R. Sup. Ct. 28, § 9(D)(b).

In consideration of the foregoing and the record as a whole, the judgment of the trial court is reversed. The Petitioner shall have sixty days from issuance of this court's mandate to file a delayed Rule 11 application.

JOSEPH M. TIPTON, PRESIDING JUDGE